4. Leadership structure of independent agencies. In Seila Law LLC v. Consumer Financial Protection Bureau, 140 S.Ct. 2183 (2020), the Court by a vote of 5-4 struck down as unconstitutional the single-director structure of the CFPB, in which the director is removable only for cause, namely inefficiency, neglect of duty, or malfeasance.

Chief Justice ROBERTS wrote for the Court: “Neither Humphrey’s Executor nor Morrison resolves whether the CFPB Director’s insulation from removal is constitutional. Start with Humphrey’s Executor. Unlike the New Deal-era FTC upheld there, the CFPB is led by a single Director who cannot be described as a ‘body of experts’ and cannot be considered ‘non-partisan’ in the same sense as a group of officials drawn from both sides of the aisle. Moreover, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB’s single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise. In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director’s enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in Humphrey’s Executor.

“The logic of Morrison also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in Morrison was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

“[The question] is whether to extend those precedents to the new situation before us, namely an independent agency led by a single Director and vested with significant executive power. We decline to do so. Such an agency has no basis in history. [In] addition to being a historical anomaly, the CFPB’s single-Director configuration is incompatible with our constitutional structure. Aside
from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual. [The] constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President.

“The CFPB’s single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. Yet the Director may unilaterally, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans. [Text] first principles, the First Congress’s decision in 1789, Myers, and Free Enterprise Fund all establish that the President’s removal power is the rule, not the exception. While we do not revisit Humphrey’s Executor or any other precedent today, we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President’s removal authority.”

Justice THOMAS concurred, joined by Justice Gorsuch: “The decision in Humphrey’s Executor poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. But with today’s decision, the Court has repudiated almost every aspect of Humphrey’s Executor. In a future case, I would repudiate what is left of this erroneous precedent. [The] Constitution does not permit the creation of officers exercising ‘quasi-legislative’ and ‘quasi-judicial powers’ in ‘quasi-legislative’ and ‘quasi-judicial agencies.’ No such powers or agencies exist. Congress lacks the authority to delegate its legislative power, and it cannot authorize the use of judicial power by officers acting outside of the bounds of Article III.”

Justice KAGAN dissented on the constitutional question, joined by Justices Ginsburg, Breyer and Sotomayor: “Throughout the Nation’s history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President’s power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause. [The] text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties.

“The majority offers the civics class version of separation of powers—call it the Schoolhouse Rock definition of the phrase. [It] is of course true that the Framers lodged three different kinds of power in three different entities. [But] as James Madison stated, the creation of distinct branches ‘did not mean that these departments ought to have no partial agency in, or no controul over the acts of
each other.’ The Federalist No. 47. To the contrary, Madison explained, the drafters of the Constitution—like those of then-existing state constitutions—opted against keeping the branches of government ‘absolutely separate and distinct.’ One way the Constitution reflects that vision is by giving Congress broad authority to establish and organize the Executive Branch. [Similarly,] the Appointments Clause reflects Congress’s central role in structuring the Executive Branch.

“[The] Court’s precedents before today have accepted the role of independent agencies in our governmental system. To be sure, the line of our decisions has not run altogether straight. But we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance. In those decisions, we sounded a caution, insisting that Congress could not impede through removal restrictions the President’s performance of his own constitutional duties. (So, to take the clearest example, Congress could not curb the President’s power to remove his close military or diplomatic advisers.) But within that broad limit, this Court held, Congress could protect from at-will removal the officials it deemed to need some independence from political pressures. Nowhere do those precedents suggest what the majority announces today: that the President has an ‘unrestricted removal power’ subject to two bounded exceptions.

“The deferential approach this Court has taken gives Congress the flexibility it needs to craft administrative agencies. Diverse problems of government demand diverse solutions. They call for varied measures and mixtures of democratic accountability and technical expertise, energy and efficiency. Sometimes, the arguments push toward tight presidential control of agencies. The President’s engagement, some people say, can disrupt bureaucratic stagnation, counter industry capture, and make agencies more responsive to public interests. See, well, Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–2346 (2001). At other times, the arguments favor greater independence from presidential involvement. Insulation from political pressure helps ensure impartial adjudications. It places technical issues in the hands of those most capable of addressing them. It promotes continuity, and prevents short-term electoral interests from distorting policy. (Consider, for example, how the Federal Reserve’s independence stops a President trying to win a second term from manipulating interest rates.) Of course, the right balance between presidential control and independence is often uncertain, contested, and value-laden. No mathematical formula governs institutional design; trade-offs are endemic to the enterprise. But that is precisely why the issue is one for the political branches to debate—and then debate again as times change.”

Insert at p. 427 as new note 3:

3. Congressional subpoenas of a sitting president’s financial records. In 2019, three committees of the U.S. House of Representatives issued a total of four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. President Trump, in his personal capacity, challenged the subpoenas in federal court on the grounds that they lacked a legitimate legislative purpose and violated the separation of powers. He did not assert executive privilege. By a 7-2 vote, the Court vacated and remanded lower court orders allowing the subpoenas, setting forth a new test to balance separation of powers concerns on remand.

Trump v. Mazars USA, LLP
Chief Justice ROBERTS delivered the opinion of the Court.

Over the course of five days in April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities. The House asserts that the financial information sought here—encompassing a decade’s worth of transactions by the President and his family—will help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections. The President contends that the House lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority. The question presented is whether the subpoenas exceed the authority of the House under the Constitution.

We have never addressed a congressional subpoena for the President’s information. [Here] the President’s information is sought not by prosecutors or private parties in connection with a particular judicial proceeding, but by committees of Congress that have set forth broad legislative objectives. Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity. That distinctive aspect necessarily informs our analysis of the question.

II.A. [The] question presented is whether the subpoenas exceed the authority of the House under the Constitution. Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the “hurly-burly, the give-and-take of the political process between the legislative and the executive.” That practice began with George Washington and the early Congress. In 1792, a House committee requested Executive Branch documents pertaining to General St. Clair’s campaign against the Indians in the Northwest Territory, which had concluded in an utter rout of federal forces when they were caught by surprise near the present-day border between Ohio and Indiana. Since this was the first such request from Congress, President Washington called a Cabinet meeting, wishing to take care that his response “be rightly conducted” because it could “become a precedent.”

The meeting, attended by the likes of Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, ended with the Cabinet of “one mind”: The House had authority to “institute inquiries” and “call for papers” but the President could “exercise a discretion” over disclosures, “communicat[ing] such papers as the public good would permit” and “refus[ing]” the rest. President Washington then dispatched Jefferson to speak to individual congressmen and “bring them by persuasion into the right channel.” The discussions were apparently fruitful, as the House later narrowed its request and the documents were supplied without recourse to the courts.

Jefferson, once he became President, followed Washington’s precedent. In early 1807, after Jefferson had disclosed that “sundry persons” were conspiring to invade Spanish territory in North America with a private army, the House requested that the President produce any information in his possession touching on the conspiracy (except for information that would harm the public interest), Jefferson chose not to divulge the entire “voluminous” correspondence on the subject, explaining that much of it was “private” or mere “rumors” and “neither safety nor justice” permitted him to “expos[e] names” apart from identifying the conspiracy’s “principal actor”:
Aaron Burr. Instead of the entire correspondence, Jefferson sent Congress particular documents and a special message summarizing the conspiracy. Neither Congress nor the President asked the Judiciary to intervene. [Congress] and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute.

B. [Congress] has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power “to secure needed information” in order to legislate. [Because] this power is “justified solely as an adjunct to the legislative process,” it is subject to several limitations. Most importantly, a congressional subpoena is valid only if it is “related to, and in furtherance of, a legitimate task of the Congress.” The subpoena must serve a “valid legislative purpose”; it must “concern[ ] a subject on which legislation ‘could be had.’” [Furthermore,] Congress may not issue a subpoena for the purpose of “law enforcement,” because “those powers are assigned under our Constitution to the Executive and the Judiciary.” [Finally,] recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.

C. [The] President contends [that] the usual rules for congressional subpoenas do not govern here because the President’s papers are at issue. They argue for a more demanding standard based in large part on cases involving the Nixon tapes. [We] disagree that these demanding standards apply here. Unlike the cases before us, Nixon involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is “fundamental to the operation of Government.” [We] decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.

D. [The] House meanwhile would have us ignore that these suits involve the President. [The] House urges us to uphold its subpoenas because they “relate[ ] to a valid legislative purpose” or “concern[ ] a subject on which legislation could be had.” [The] House’s approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President’s information. [Far] from accounting for separation of powers concerns, the House’s approach aggravates them by leaving essentially no limits on the congressional power to subpoena the President’s personal records. Any personal paper possessed by a President could potentially “relate to” a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects. [Without] limits on its subpoena powers, Congress could “exert an imperious controul” over the Executive Branch and aggrandize itself at the President’s expense, just as the Framers feared. The Federalist No. 71 (A. Hamilton); No. 48 (J. Madison).

The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity. The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs. “The interest of the man” is often “connected with the constitutional rights of the place.” The Federalist No. 51 (J. Madison). [In] addition, separation of powers concerns are no
less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President’s information present an interbranch conflict no matter where the information is held—it is, after all, the President’s information. Were it otherwise, Congress could sidestep constitutional requirements any time a President’s information is entrusted to a third party—as occurs with rapidly increasing frequency.

E. [Congressional] subpoenas for the President’s personal information implicate weighty concerns regarding the separation of powers. Neither side, however, identifies an approach that accounts for these concerns. [A] balanced approach is necessary, one that takes a “considerable impression” from “the practice of the government,” and “resist[s]” the “pressure inherent within each of the separate Branches to exceed the outer limits of its power.” We therefore conclude that, in assessing whether a subpoena directed at the President’s personal information is “related to, and in furtherance of, a legitimate task of the Congress,” courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the “unique position” of the President. Several special considerations inform this analysis.

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. “[O]ccasion[s] for constitutional confrontation between the two branches’ should be avoided whenever possible.” Congress may not rely on the President’s information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. [Second,] to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress’s legislative objective. [Third,] courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress’s legislative purpose, the better. [Fourth,] courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President’s time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. See Clinton. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage. Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

[Congressional] subpoenas for information from the President [implicate] special concerns regarding the separation of powers. The courts below did not take adequate account of those concerns. The judgments [below] are vacated, and the cases are remanded for further proceedings consistent with this opinion.

Justice THOMAS, dissenting.

[I] would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power.
I. I begin with the Committees’ claim that the House’s legislative powers include the implied power to issue legislative subpoenas. Although the Founders understood that the enumerated powers in the Constitution included implied powers, the Committees’ test for the scope of those powers is too broad. [The] idea of implied powers usually arises in the context of the Necessary and Proper Clause, [which] “made explicit what was already implicit in the grant of each enumerated power.” The scope of these implied powers is very limited. [An] implied power [must] be necessarily implied from an enumerated power.

II. At the time of the founding, the power to subpoena private, nonofficial documents was not included by necessary implication in any of Congress’ legislative powers. The Committees argue that Congress wields the same investigatory powers that the British Parliament did at the time of the founding. But this claim overlooks one of the fundamental differences between our Government and the British Government: Parliament was supreme. Congress is not.

[When] this Court first addressed a legislative subpoena, it refused to uphold it. After casting doubt on legislative subpoenas generally, the Court held that the subpoena at issue was unlawful because it sought to investigate private conduct. In 1876, the House created a special Committee to investigate the failure of a major bank, which caused the loss of federal funds and related to financial speculation in the District of Columbia. The Committee issued a subpoena to Kilbourn, an employee of the bank. When he refused to answer questions or produce documents, the House held him in contempt and arrested him. After his release, he sued the Speaker, several Committee members, and the Sergeant at Arms for damages. The Court discussed the arguments for an “impli[ed]” power to issue legislative subpoenas. [Although] the Court did not have occasion to decide whether the legislative subpoena in that case was necessary to the exercise of Congress’ legislative powers, its discussion strongly suggests the subpoena was unconstitutional.

Nearly half a century later [in the McGrain case, the] Court reached the question reserved in Kilbourn—whether Congress has the power to issue legislative subpoenas. It rejected Kilbourn’s reasoning and upheld the power to issue legislative subpoenas as long as they were relevant to a legislative power. [McGrain] developed a test that rested heavily on functional considerations. [The] Court has since applied this test to subpoenas for papers without any further analysis of the text or history of the Constitution. [I] would simply decline to apply [McGrain] in these cases because it is readily apparent that the Committees have no constitutional authority to subpoena private, nonofficial documents.

III. If the Committees wish to investigate alleged wrongdoing by the President and obtain documents from him, the Constitution provides Congress with a special mechanism for doing so: impeachment. [The] Constitution grants the House “the sole Power of Impeachment,” Art. I, § 2, cl. 5, and it specifies that the President may be impeached for “Treason, Bribery, or other High Crimes and Misdemeanors,” Art. II, § 4. The founding generation understood impeachment as a check on Presidential abuses. [The] power to impeach includes a power to investigate and demand documents. [I] express no view today on the boundaries of the power to demand documents in connection with impeachment proceedings. But the power of impeachment provides the House with authority to investigate and hold accountable Presidents who commit high crimes or misdemeanors. That is the proper path by which the Committees should pursue their demands.
Justice ALITO, dissenting.

[I] agree that the lower courts erred and that these cases must be remanded, but I do not think that the considerations outlined by the Court can be properly satisfied unless the House is required to show more than it has put forward to date. Specifically, the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance. The House should also spell out its constitutional authority to enact the type of legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs. In addition, it should explain why the subpoenaed information, as opposed to information available from other sources, is needed. Unless the House is required to make a showing along these lines, I would hold that enforcement of the subpoenas cannot be ordered. Because I find the terms of the Court’s remand inadequate, I must respectfully dissent.

Insert on p. 435 as new note number 2:

2. Issuance of a state criminal subpoena to a sitting president. In 2019, a New York state grand jury issued a subpoena duces tecum on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump, for financial records relating the President and his businesses. The District Attorney of New York sought enforcement of the subpoena. The President, acting in his personal capacity, sued the district attorney and Mazars in federal district court to enjoin enforcement of the subpoena, arguing that a sitting President enjoys absolute immunity from state criminal process under Article II and the Supremacy Clause.

Trump v. Vance
__ U.S.__; 140 S. Ct. 2412 (2020)

Chief Justice ROBERTS delivered the opinion of the Court.

[This] case involves—so far as we and the parties can tell—the first state criminal subpoena directed to a President. The President contends that the subpoena is unenforceable. [In] the summer of 1807, Aaron Burr, the former Vice President, was on trial for treason. [In] the lead-up to trial, Burr [moved] for a subpoena duces tecum directed at Jefferson. The draft subpoena required the President to produce [a] letter from [Burr’s accuser, General James] Wilkinson and accompanying documents. [The] prosecution opposed the request, arguing that a President could not be subjected to such a subpoena and that the letter might contain state secrets. Following four days of argument, Marshall announced his ruling to a packed chamber. The President, Marshall declared, does not “stand exempt from the general provisions of the constitution” or, in particular, the Sixth Amendment’s guarantee that those accused have compulsory process for obtaining witnesses for their defense. At common law the “single reservation” to the duty to testify in response to a subpoena was “the case of the king,” whose “dignity” was seen as “incompatible” with appearing “under the process of the court.” But, as Marshall explained, a king is born to power and can “do no wrong.” The President, by contrast, is “of the people” and subject to the law.

[In] the two centuries since the Burr trial, successive Presidents have accepted Marshall’s ruling that the Chief Executive is subject to subpoena. [The] bookend to Marshall’s ruling came in 1974
[in] U.S. v. Nixon. [Invoking] the common law maxim that “the public has a right to every man’s evidence,” the Court [concluded] that the President’s “generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.” Two weeks later, President Nixon dutifully released the tapes.

The history surveyed above all involved federal criminal proceedings. Here we are confronted for the first time with a subpoena issued to the President by a local grand jury operating under the supervision of a state court. [We] begin with the question of absolute immunity. The President’s primary contention [is] that complying with state criminal subpoenas would necessarily divert the Chief Executive from his duties. [But] Nixon v. Fitzgerald did not hold that distraction was sufficient to confer absolute immunity. [Indeed,] we expressly rejected immunity based on distraction alone 15 years later in Clinton v. Jones.[The] President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. [But] even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing the citizen’s normal duty of furnishing information relevant to a criminal investigation. [Finally,] the President warns that subjecting Presidents to state criminal subpoenas will make them “easily identifiable targets” for harassment. But we rejected a nearly identical argument in Clinton.

[We] recognize [that] harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive. Even so, in Clinton we found that the risk of harassment was not “serious” because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits. And, while we cannot ignore the possibility that state prosecutors may have political motivations, here again the law already seeks to protect against the predicted abuse. [Grand] juries are prohibited from engaging in arbitrary fishing expeditions and initiating investigations out of malice or an intent to harass. [In] the event of such harassment, a President would be entitled to the protection of federal courts.

[And the] Supremacy Clause prohibits state judges and prosecutors from interfering with a President’s official duties. [Federal] law allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here. Given these safeguards and the Court’s precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause. [On] that point the Court is unanimous.

We next consider whether a state grand jury subpoena seeking a President’s private papers must satisfy a heightened need standard. [We] disagree, for three reasons. First, such a heightened standard would extend protection designed for official documents to the President’s private papers. [Second,] neither the Solicitor General nor Justice Alito has established that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions. [Finally,] in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring a state grand jury to meet a heightened standard of need would hobble the grand jury’s ability to acquire all information that might possibly bear on its investigation.

[A] President may avail himself of the same protections available to every other citizen. These include the right to challenge the subpoena on any grounds permitted by state law, which usually
include bad faith and undue burden or breadth. A President can raise subpoena-specific constitutional challenges, in either a state or federal forum. In addition, the Executive can show that compliance with a particular subpoena would impede his constitutional duties. At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such interference with the President’s duties would not occur.

Justice KAVANAUGH, joined by Justice Gorsuch, concurring in the judgment.

I would apply the longstanding Nixon “demonstrated, specific need” standard to this case. In my view, lower courts in cases of this sort involving a President will almost invariably have to begin by delving into why the State wants the information; why and how much the State needs the information, including whether the State could obtain the information elsewhere; and whether compliance with the subpoena would unduly burden or interfere with a President’s official duties.

Justice THOMAS, dissenting.

I agree with the majority that the President is not entitled to absolute immunity from issuance of the subpoena. But he may be entitled to relief against its enforcement. If the President can show that his duties as chief magistrate demand his whole time for national objects, he is entitled to relief from enforcement of the subpoena. The Burr standard places the burden on the President but also requires courts to take pains to respect the demands on the President’s time. The Constitution vests the President with extensive powers and responsibilities, and courts are poorly situated to conduct a searching review of the President’s assertion that he is unable to comply.

Justice ALITO, dissenting.

A State may not block or interfere with the lawful work of the National Government. McCulloch. A sitting President may not be prosecuted by a local district attorney. If a sitting President were charged in New York County, would he be arrested and fingerprinted? He would presumably be required to appear for arraignment in criminal court, where the judge would set the conditions for his release. Could he be sent to Rikers Island or be required to post bail? This entire imagined scene is farcical. The right of all the People to a functioning government would be sacrificed.

Chapter 8

Insert at p. 546 after the note at the bottom of the page:

In June Medical Services v. Russo, 140 S.Ct. 2103 (2020), the Court took up a Louisiana law that was “almost word-for-word identical” to the Texas law struck down in Whole Women’s Health. By a 5-4 vote, the Court struck down the law but with no majority opinion. Justice BREYER, joined by Justices Ginsburg, Kagan and Sotomayor, explained: “This case is similar to, nearly identical with, Whole Woman’s Health. And the law must consequently reach a similar conclusion.” Chief Justice ROBERTS provided the fifth vote but concurred only in the judgment: “I joined the dissent in Whole Woman’s Health and continue to believe that the case was wrongly decided. The question today however is not whether Whole Woman’s Health was right or wrong, but whether to adhere to it in deciding the present case. The legal doctrine of stare decisis requires
us, absent special circumstances, to treat like cases alike. [This] principle is grounded in a basic humility that recognizes today’s legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them. Because the ‘private stock of reason ... in each man is small, ... individuals would do better to avail themselves of the general bank and capital of nations and of ages.’ 3 E. Burke, Reflections on the Revolution in France 110 (1790). [Stare decisis] is not an inexorable command. But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered.

“[Under] Casey, the State may not impose an undue burden on the woman’s ability to obtain an abortion. [After] faithfully reciting this standard, the Court in Whole Woman’s Health added the following observation: ‘The rule announced in Casey... requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.’ Read in isolation from Casey, such an inquiry could invite a grand balancing test in which unweighted factors mysteriously are weighed. Under such tests, ‘equality of treatment is ... impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.’ Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989). In this context, courts applying a balancing test would be asked in essence to weigh the State’s interests in ‘protecting the potentiality of human life’ and the health of the woman, on the one hand, against the woman’s liberty interest in defining her ‘own concept of existence, of meaning, of the universe, and of the mystery of human life’ on the other. Casey. There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. [Pretending] that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an unanalyzed exercise of judicial will in the guise of a neutral utilitarian calculus. Nothing about Casey suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. Casey instead focuses on the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts. [Under] principles of stare decisis, I agree with the plurality that the determination in Whole Woman’s Health that Texas’s law imposed a substantial obstacle requires the same determination about Louisiana’s law. Under those same principles, I would adhere to the holding of Casey, requiring a substantial obstacle before striking down an abortion regulation.”

Justice THOMAS dissented, reasoning that “abortionists and abortion clinics” have no standing to bring claims that “vindicate no private rights of their own.”

Justice ALITO also dissented, joined by Justice Gorsuch and in part by Justices Thomas and Kavanaugh: “Unless Casey is reexamined—and Louisiana has not asked us to do that—the test it adopted should remain the governing standard. Stare decisis is a major theme in the plurality opinion and that of the Chief Justice. Both opinions try to create the impression that this case is the same as Whole Woman’s Health and that stare decisis therefore commands the same result. In truth, however, the two cases are very different. [The] decision in Whole Woman’s Health was not based on the face of the Texas statute, but on an empirical question, namely, the effect of the statute on access to abortion in that State. The Court’s answer to that question depended on numerous factors that may differ from State to State, including the demand for abortions, the number and
location of abortion clinics and physicians, the geography of the State, the distribution of the population, and the ability of physicians to obtain admitting privileges. There is no reason to think that a law requiring admitting privileges will necessarily have the same effect in every state.”

Justice GORSUCH also dissented: “When a State enacts a law to further the health or safety of a woman seeking an abortion, the Casey plurality added a key qualification: Only ‘unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.’ That qualification is clearly applicable here, yet the concurrence nowhere addresses it, applying instead a new test of its own creation. [Under] the concurrence’s test it seems possible that even the most compelling and narrowly tailored medical regulation would have to fail if it placed a substantial obstacle in the way of abortion access. Such a result would appear to create yet another discontinuity with Casey, which expressly disavowed any test as strict as strict scrutiny.”

Justice KAVANAUGH also dissented: “In my view, additional factfinding is necessary to properly evaluate Louisiana’s law. [The] Court should remand the case for a new trial and additional factfinding under the appropriate legal standards.”

Chapter 12

Insert on p. 1343 before note 8

In *Agency for International Development v. Alliance for Open Society International Inc.*, 140 S. Ct. 2082 (2020), the Court considered whether the same law at issue in AOS II was unconstitutional as applied to foreign affiliates of U.S.-based organizations. By a 5-3 vote, the Court rejected the challenge. Justice KAVANAUGH wrote for the Court that the foreign affiliates had no First Amendment rights because “foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution” and “separately incorporated organizations are separate legal units with distinct legal rights and obligations” as a matter of corporate law.

Justice BREYER dissented, joined by Justices Ginsburg and Sotomayor (Justice Kagan was recused). He wrote: “This case is not about the First Amendment rights of foreign organizations [but rather] about the First Amendment rights of American organizations. [Respondents] and their affiliates receive federal funding to fight HIV/AIDS overseas. What has been at stake in this case from the beginning, then, is protected speech often aimed at audiences abroad. Our decision in AOSII shielded respondents’ global message from government-compelled distortion in the eyes of those foreign audiences, as well as listeners here at home. Yet in the wake of our ruling, respondents have continued to suffer that exact same First Amendment harm. True, respondents’ international mission sometimes requires that they convey their message through affiliates incorporated in far-off countries, rather than registered here at home. But so what? Audiences everywhere attribute speech based on whom they perceive to be speaking, not on corporate paperwork they will never see. [The] idea that foreign citizens abroad never have constitutional rights is not a ‘bedrock’ legal principle. [This] Court has studiously avoided establishing an absolute rule that forecloses that protection in all circumstances. [The] exhaustive review of our precedents that we conducted in Boumediene [20th ed., p. 379] pointed to the opposite conclusion. [And] our First Amendment precedents (including AOS II) refute any suggestion that a workaday
principle of corporate law somehow resolves the constitutional issue here in dispute.”

Chapter 14

Insert at p. 1607 after discussion of Hosanna-Tabor:

In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Court, by a 7-2 vote, extended the ministerial exception to foreclose employment discrimination claims by two teachers against the Catholic elementary schools where they taught. The teachers’ duties included both secular and religious instruction. Justice ALITO wrote for the Court: “Although these teachers were not given the title of ‘minister,’ [we] hold that their cases fall within the same rule that dictated our decision in Hosanna-Tabor. The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.”

Justice Alito went on to offer a justification that had not appeared in Chief Justice Roberts’s majority opinion in Hosanna-Tabor, namely a principle of church autonomy: “The independence of religious institutions in matters of faith and doctrine is closely linked to independence in what we have termed ‘matters of church government.’ This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution’s central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.” Turning to the term “minister,” Justice Alito wrote that “[s]imply giving an employee the title of ‘minister’ is not enough to justify the exception. And by the same token, since many religious traditions do not use the title ‘minister,’ it cannot be a necessary requirement. [What] matters, at bottom, is what an employee does. And implicit in our decision in Hosanna-Tabor was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.”

Justice THOMAS, joined by Justice Gorsuch, concurred to “reiterate” his view that “the Religion Clauses require civil courts to defer to religious organizations’ good-faith claims that a certain employee’s position is ministerial.”

Justice SOTOMAYOR, joined by Justice Ginsburg, dissented: “Two employers fired their employees allegedly because one had breast cancer and the other was elderly. [The] majority shields those employers from disability and age-discrimination claims. [The] Court reaches this result even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic. In foreclosing the teachers’ claims, the Court [collapses] Hosanna-Tabor’s careful analysis into a single consideration: whether a church thinks its employees play an important religious role. [That] simplistic approach has no basis in law and strips thousands of schoolteachers of their legal protections. [Until] today, no court had held that the ministerial exception applies [to] lay teachers like respondents. [To] be sure, [the
teachers] taught religion for a part of some days in the week. But that should not transform them automatically into ministers. [Nor] is it dispositive that both teachers prayed with their students.”

Insert on p. 1703 after note 2:

3. In Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020), the Court revisited the Locke v. Davey question in a slightly different form, and by a 5-4 vote now sustained a Free Exercise challenge to a state rule barring the use of tax-subsidized scholarships for attendance at religious schools. Chief Justice ROBERTS wrote the opinion of the Court: “The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. The program grants a tax credit to anyone who donates to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. The Court relied on the no-aid provision of the State Constitution, which prohibits any aid to a school controlled by a ‘church, sect, or denomination.’ The question presented is whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision. [The] parties do not dispute that the scholarship program is permissible under the Establishment Clause. [The] government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools. [We] accept the Montana Supreme Court’s interpretation of state law—including its determination that the scholarship program provided impermissible ‘aid’ within the meaning of the Montana Constitution—and we assess whether excluding religious schools and affected families from that program was consistent with the Federal Constitution. [As in Trinity Lutheran,] Montana’s no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. [This] case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status. [Status-based] discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.”

Chief Justice Roberts then distinguished Locke, which, he wrote, “differs from this case in two critical ways. First, Locke explained that Washington had merely chosen not to fund a distinct category of instruction: the essentially religious endeavor of training a minister to lead a congregation. Thus, Davey was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry. Apart from that narrow restriction, Washington’s program allowed scholarships to be used at ‘pervasively religious schools’ that incorporated religious instruction throughout their classes. By contrast, Montana’s Constitution does not zero in on any particular ‘essentially religious’ course of instruction at a religious school. Rather, [the] no-aid provision bars all aid to a religious school ‘simply because of what it is,’ putting the school to a choice between being religious or receiving government benefits. At the same time, the provision puts families to a choice between sending their children to a religious school or receiving such benefits. Second, Locke invoked a ‘historic and substantial’ state interest in not funding the training of clergy. As evidence of that tradition, the Court in Locke emphasized that the propriety of state-supported clergy was a central subject of founding-era debates, and that most state constitutions from that era prohibited the expenditure of tax dollars to support the clergy. But no comparable ‘historic and substantial’ tradition supports Montana’s decision to disqualify religious schools from government aid. In the founding era and the early 19th century, governments
provided financial support to private schools, including denominational ones. ‘Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy.’ L. Jorgenson, The State and the Non-Public School, 1825–1925, p. 4 (1987).

“[The] Department argues that a tradition against state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions. Such a development, of course, cannot by itself establish an early American tradition. [In] addition, many of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. That proposal—which Congress nearly passed—would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding ‘sectarian’ schools. It was an open secret that ‘sectarian’ was code for ‘Catholic.’ The Blaine Amendment was born of bigotry and arose at a time of pervasive hostility to the Catholic Church and to Catholics in general; many of its state counterparts have a similarly shameful pedigree. The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.”

Justice THOMAS concurred separately to reiterate his view that the Establishment Clause “served only to ‘protect States, and by extension their citizens, from the imposition of an established religion by the Federal Government’ and thus does not allow challenges to actions by the states. He was joined by Justice Gorsuch, marking the first time any other justice espoused this view. Justice ALITO concurred to offer an account of the anti-Catholic nature of the state Blaine amendments such as Montana’s. Justice GORSUCH concurred to restate the criticisms he made of the religious status/religious use distinction in his concurrence in Trinity Lutheran.

Justice GINSBURG, joined by Justice Kagan, dissented: “The Montana court remedied the state constitutional violation by striking the scholarship program in its entirety. Under that decree, secular and sectarian schools alike are ineligible for benefits, so the decision cannot be said to entail differential treatment based on petitioners’ religion. Put somewhat differently, petitioners argue that the Free Exercise Clause requires a State to treat institutions and people neutrally when doling out a benefit—and neutrally is how Montana treats them in the wake of the state court’s decision.”

Justice BREYER also dissented: “Although the majority refers in passing to the ‘play in the joints’ between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, its holding leaves that doctrine a shadow of its former self. [I] think the majority is wrong to replace the flexible, context-specific approach of our precedents with a test of ‘strict’ or ‘rigorous’ scrutiny. And it is wrong to imply that courts should use that same heightened scrutiny whenever a government benefit is at issue. [Government] benefits come in many shapes and sizes. The appropriate way to approach a State’s benefit-related decision may well vary depending upon the relation between the Religion Clauses and the specific benefit and restriction at issue. [Disagreements] that concern religion and its relation to a particular benefit may prove unusually difficult to resolve. They may involve small but important details of a particular benefit program. Does one detail affect one religion negatively and another positively? What about a religion that objects to the particular way in which the government seeks to enforce mandatory (say, qualification-related) provisions of a particular benefit program?”

Justice SOTOMAYOR also dissented: “Until Trinity Lutheran, the right to exercise one’s religion
did not include a right to have the State pay for that religious practice. That is because a contrary rule risks reading the Establishment Clause out of the Constitution. [A] State may refuse to extend certain aid programs to religious entities when doing so avoids historic and substantial antiestablishment concerns.”